89-316

No. _____

In The

Supreme Court of the United States

October Term, 1989

CITY OF MONTCLAIR, a California City,

Petitioner,

v.

UNITED ARTISTS COMMUNICATIONS, INC.; VISTA THEATERS, INC., and GENERAL CINEMA THEATRE CORPORATION OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

EUGENE DEMCHUK, CITY ATTORNEY
City of Montclair, and
BURKE, WILLIAMS & SORENSEN,
Special Counsel
J. ROBERT FLANDRICK*
VIRGINIA R. PESOLA
One Wilshire Building, 11th Floor
624 S. Grand Avenue
Los Angeles, California 90017
Telephone: (213) 236-0600

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Does the First Amendment, as interpreted by this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, prohibit a city from applying a facially nondiscriminatory admissions tax to persons attending movie theaters where the tax is applied to all businesses in the City which charge admission and the revenue from the tax is used to pay for the public services provided to the businesses taxed?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Montclair and respondents United Artists Communications, Inc.; Vista Theaters, Inc.; and General Cinema Theatre Corporation of California.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

Petitioner City of Montclair respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth Appellate District, Division Two, filed March 10, 1989, and which became final May 24, 1989. The decision holds that a content neutral, facially nondiscriminatory admissions tax applicable to all businesses in the City which charge admission to commercial entertainment, the proceeds of which are used to pay for the public services provided to those businesses, violates respondent movie theaters' First Amendment rights to free speech because the tax imposes

a disproportionate burden on the theaters. In reaching this conclusion the Court of Appeal relied on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983).

OPINION BELOW

The opinion of the California Court of Appeal appears as Appendix A and is reported at 209 Cal.App.3d 245 (1989).

JURISDICTION

Respondents United Artists Communications, Inc.; Vista Theaters, Inc.; and General Cinema Theatre Corporation of California sought injunctive and declaratory relief against enforcement of petitioner City of Montclair's admissions tax ordinance alleging it violates the First Amendment to the United States Constitution.

The jurisdiction of this Court to review the decision of the California Court of Appeal is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides

> "Congress shall make no law . . . abridging the freedom of speech . . . "

The full text of City of Montclair Ordinance No. 86-630 appears as Appendix A.

STATEMENT OF THE CASE

Petitioner City of Montclair ("City") is a small city of 24,601 residents located in San Bernardino County, California, midway between the Cities of Los Angeles and San Bernardino. The City adopted an admissions tax ordinance in October 1986 ("Ordinance") to raise revenue "to assist in covering the cost of providing municipal services required by businesses covered under [the ordinance]." (Section 3-5.502, App. B1.)

The Ordinance levies a six percent tax on the price of a ticket (Section 3-5.504, App. B2) for the following events: "Motion pictures, theatrical performances, musical performances, operas, athletic contests, exhibitions of art or handicrafts or products, lectures, speeches, fairs, circuses, carnivals, menageries, or any other activity conducted for which an admission ticket is sold for the privilege of viewing such activity". (Section 3-5.503(2), App. B2.)

Exempted from the Ordinance are events conducted for the benefit of or by nonprofit entities and organizations. (Section 3-5.529, App. B14-15.)

At the time the Ordinance was adopted by the City Council, several businesses in the City charged admission and fell within the classification created by the Ordinance – the Holiday Skating Rink, the Laff Stop, the Grand Prix

Raceway, four nightclub/restaurants, two adult bookstores with viewing booths, and respondents, United Artists Communications, Inc., Vista Theaters, and General Theatre Corporation of California, which own, operate and/or serve as managing agents for several movie theaters in the City ("movie theaters").

Shortly after the Ordinance was adopted, the movie theaters filed a Complaint for Declaratory and Injunctive Relief, challenging the tax imposed by the Ordinance as impermissibly burdening their First Amendment rights. The case was tried on a Stipulation of Facts which stated that, at present, an estimated ninety percent of the admissions tax liability was borne by the movie theaters. After a nonjury trial, the Superior Court entered Judgment for the City.

The movie theaters appealed. The Court of Appeal, Fourth District, Division Two, held the admissions tax was unconstitutional as applied to the movie theaters because its effect was to place a disproportionate share of the admissions tax burden on the movie theaters. The Court of Appeal based its decision on the purported authority of *Minneapolis Star Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1985) (*"Minneapolis Star"*).

The City timely filed a Petition for Review to the California Supreme Court. The Petition was denied May 24, 1989. (Appendix C.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE CALIFORNIA COURT OF APPEAL THAT A CITY MAY NOT APPLY A CONTENT NEUTRAL, FACIALLY NON-DISCRIMINATORY ADMISSIONS TAX TO MOVIE THEATER CUSTOMERS IS AN UNWARRANTED EXTENSION OF *MINNEAPOLIS STAR* WHICH WILL HAVE GRAVE FINANCIAL CONSEQUENCES FOR COUNTLESS CITIES WHICH RELY ON ADMISSIONS TAX REVENUE

A. A City Has Broad Powers To Classify For Tax Purposes, Including The Power To Classify And Tax The Entertainment Industry

Traditionally, the constitutional validity of a governmental classification for tax purposes which is content-neutral and facially nondiscriminatory, including a classification containing businesses which enjoy First Amendment privileges, has been upheld if the burden of the tax falls equally on all members of the class, and if the classification is "founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of the legislation." (*Fox Bakersfield Theaters Corp. v. City of Bakersfield*, 36 Cal.2d 136, 142, 222 P.2d 879 (1950), relying on *Tax Commissioners v. Jackson*, 283 U.S. 527 (1930).)

A tax based on the price of admission is not new or special, nor is the tax unique to California cities. (See, e.g., *Metropolis Theatre Company v. City of Chicago*, 228 U.S. 61 (1913) [upholding tax on admissions to "all entertainments of a theatrical, dramatic, vaudeville, variety or spectacular character"]. A statewide admissions tax is imposed by at least one state. (See *Connecticut Performing*

Arts Foundation, Inc. v. Brown, 801 F.2d 566 (2nd Cir. 1986.))

Legislation separately classifying places of amusement for the purpose of imposing license taxes on the owners or operators of them as a group has been upheld consistently by state and federal courts. (See *Fox v. City of Bakersfield*, 36 Cal.2d 143; *City of Bessemer v. Bessemer Theatres*, 252 Ala. 117, 39 So.2d 658 (1949); *Knoxtenn Theatres v. Dance*, 186 Tenn. 114, 208 S.W.2d 536 (1948); *City of Miami v. Kayfetz*, 158 Fla. 758, 30 So.2d 521 (1947); *Veterans' Foreign Wars v. Hull*, 51 N.M. 478, 188 P.2d 334 (1947); *Curdts v. South Carolina Tax Commission*, 131 S.C. 362, 127 S.E. 438 (affirmed in memo. opinion) 273 U.S. 669 (1925); *Bullock v. Texas Skating Association*, 583 S.W.2d 888 (Tx.Ct.App. 1979); *Ringling Bros.-Barnum & Bailey C. Shows v. Shepard*, 123 F.2d 773 (5th Cir. 1941).

Most recently, in *Times-Mirror v. City of Los Angeles*, 192 Cal.App.3d 170, 185, 237 Cal.Rptr. 346 (1987), the Second District Court of Appeal rejected a First Amendment challenge based on *Minneapolis Star*, stating "occupations and businesses, including the entertainment industry may be properly subdivided and separately classified." (See also *Fox v. City of Bakersfield*, 36 Cal.2d at 142-143; *City of Berkeley v. Oakland Raiders*, 143 Cal.App.3d 636, 639, 192 Cal.Rptr. 66 (1983), relying on *Tax Commissioners v. Jackson*, 283 U.S. at 537.)

Similarly, state courts across the nation have held that the amusement industry may be further subdivided, so that movie theaters can be taxed as a separate subclass of the entertainment industry. (*Bijou Amusement Co. v. Toupin*, 63 R.I. 503, 9 A.2d 852 (1939); *State v. Greene*, 104

Mont. 460, 67 P.2d 995 (1937); *Brandenburg v. City of Covington*, 153 Ga. 92, 111 S.E. 574 (1922); *City of Drumright v. Strand Amusement Co.*, 139 Okla. 162, 282 P. 128 (1929); *City of Metropolis v. Gibbons*, 334 Ill. 431, 166 N.E. 115 (1929); *National Amusements, Inc. v. City of Springdale, Ohio*, 3 Ohio App.3d 70, 443 N.E.2d 1016 (1981); *North Fort Worth Amusement Co. v. Card*, 23 S.W.2d 778 (Tx.Ct.App. 1930).)

This Court upheld the constitutionality of an admissions tax in *Metropolis Theatre Company v. City of Chicago*, 228 U.S. 61, because

> "there is natural relation between the price of admission and revenue, some advantage certainly that determines the choice. The distinction obtains in every large city of the country. The reason for it must therefore be substantial, and if it be so universal in the practice of the business it would seem not unreasonable if it be adopted as the basis of government action." (228 U.S. at 69.)

A tax on a business which enjoys First Amendment privileges need not be imposed on all businesses in the City to be valid under the First Amendment. In *Century Federal, Inc. v. City of Palo Alto*, 710 F.Supp. 1559, 1579 (N.D.Cal. 1988), the District Court addressed the issue of whether the First Amendment permitted a city to charge a cable company a franchise fee for using public rights-of-way when it did not charge other users, such as Pacific Bell, such a fee. Relying on *Minneapolis Star*, the court said:

> "[W]ere the cities to charge *all comparable users* of the public rights of way equally or to demonstrate that there is a difference between cable

> and other users that justifies imposing a greater rent on cable, the franchise fee would presumably be valid" (Emphasis added.)

A tax is valid if all comparable businesses are treated equally. The Ordinance meets that test: It includes all businesses which share the common denominator of charging admission.

Contrary to the long line of case law precedent upholding the power of a city to classify and tax separately businesses which charge admission, the California Court of Appeal construed the First Amendment as a bar to taxation of businesses unless all businesses in a city are similarly taxed. If the Court of Appeal's decision is allowed to stand, then cities, first in California, then across the nation, will be deprived of one of their most fundamental powers – to classify for purposes of taxation.

B. The Montclair Admissions Tax Has None Of The Features Which Made The Minnesota Tax On The Press Unconstitutional

The *Minneapolis Star* case addressed the narrow issue of "a state's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers." (460 U.S. at 576.) The tax invalidated in *Minneapolis Star* is unlike the Montclair tax in several significant respects – the Montclair tax does not tax the press, it is not facially discriminatory, and it does not contain exemptions having the effect of targeting only a few businesses.

While it is now beyond argument that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee" (*Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)), it is also a well-established principle of law that, "the moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself" (*Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) [Jackson, J., concurring]); therefore, "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." (*Southwestern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).)

Movie theaters differ from the press in many significant respects and, for this reason alone, the analysis in *Minneapolis Star* should not have been applied without consideration of the special characteristics which distinguish theaters from the press.

The businesses taxed under the Ordinance, including the movie theaters, are unique by virtue of the sizeable crowds they draw and the unique demands these businesses place on municipal services. This difference between businesses which charge admission and other types of businesses has been acknowledged by the California Supreme Court:

> "[O]ne of the main features of the tax is that it is imposed on those amusement businesses charging admission and those taxed are the ones where larger groups of people are likely to

> gather, with the accompanying effects on the functioning and activities of the government." (*Fox Bakersfield Theaters Corp. v. City of Bakersfield*, 36 Ca1.2d at 144.)

Unlike other commercial establishments, the businesses covered by the Ordinance require extraordinary public services, including litter control, street sweeping, sanitation collection, fire prevention, law enforcement, traffic control, and, potentially, crowd control. By their nature, these businesses usually generate very little, if any, sales tax for cities in comparison with other business establishments, yet they attract a substantial number of nonresidents who raise the cost of providing public services.

Neither of the two forms of discrimination which imbued the Minnesota tax is present here. The Ordinance neither singles out movie theaters, or any other First Amendment medium, as a whole, nor targets individual theaters. (See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).)

The Minnesota tax classification was itself discriminatory, singling out some businesses for special tax treatment which resulted in those businesses paying more taxes than other businesses similarly situated. The discrimination was built into the structure of the Minnesota statute, and thus the tax was discriminatory on its face.

In contrast, the Montclair ordinance taxes all businesses which charge admission. The movie theaters, like all other for-profit businesses in the City which charge admission, are taxed at an even rate based upon the amount of business they generate.

The Ordinance does not single out or target First Amendment activities in general or movie theaters in particular. In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, this Court explained that targeting occurs when a tax "is not evenly applied to all magazines." The Arkansas tax, like the Minnesota tax, was invalidated because it contained exemptions. Unlike the Minnesota and Arkansas statutes, the Ordinance does not, by means of exemptions, create an artificial subclassification in order to tax some who are engaged in the same business and not others. Rather, all movie theaters which charge an admission are taxed.

In *Arcara v. Cloud Books*, 478 U.S. 697 (1986), this Court characterized *Minneapolis Star* as involving a tax the burden of which "*inevitably* fell disproportionately – in fact, almost exclusively – upon the shoulders of newspapers . . . ". (p. 704; emphasis added.) In upholding the regulation before it, the Court said: "[N]or does the distinction drawn by the New York Public Health Law *inevitably* single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden, as did the tax struck down in *Minneapolis Star*." (p. 705; emphasis added.) In concluding its opinion, this Court in *Arcara* held strict scrutiny was required "where a statute based on a nonexpressive activity has the *inevitable* effect of singling out those engaged in expressive activity, as in *Minneapolis Star*." (pp. 706-707; emphasis added.)

Here, the burden of the tax does not *inevitably* single out or fall upon the movie theaters. The movie theaters'

proportionate tax burden does not result from the structure of the Ordinance but rather from external circumstances over which the City has little, if any, control.

2. THE COURT OF APPEAL HAS CREATED A NEW CONSTITUTIONAL TEST; TYING THE VALIDITY OF A TAX CLASSIFICATION TO THE NUMBER AND TYPES OF BUSINESSES OPERATING IN A CITY WHEN A TAX IS ADOPTED IS WITHOUT PRECEDENT

The *Minneapolis Star* decision sets forth tests to determine whether a taxing statute is discriminatory on its face. The Court of Appeal adopted these tests wholesale and used them to analyze a tax ordinance which is facially nondiscriminatory. This is an unprecedented and unwarranted extension of *Minneapolis Star.*

The Court of Appeal invalidated the Ordinance based solely on the fact that a particular type of commercial entertainment attracts more customers than other types of entertainment located in the City. Instead of testing the validity of the Ordinance by determining whether the tax classification is based on the natural, fundamental and intrinsic characteristics of the businesses in the classification and the way the tax is structured, the Court of Appeal looked at the number of admission-charging businesses in Montclair and based its decision on the number of people in Montclair who choose to attend movie theaters as compared to the number of people who attend the skating rink or the other businesses in the City which charge admission.

Under the Court of Appeal's reasoning, an admissions tax would not violate the First Amendment if the

burden of the tax were evenly apportioned between First Amendment and non-First Amendment businesses. Thus, the tax would be valid in the City of Inglewood where hundreds of thousands of people pay admission each year to attend Laker basketball games and horse races at Hollywood Park. Such a tax would be valid in Anaheim by virtue of the number of people who visit Disneyland and attend Angel baseball games and Rams football games and in Arcadia and Del Mar because both cities have racetracks which draw large crowds. These cities differ in no significant respect from Montclair except that they contain a non-First Amendment business or businesses which draw crowds as large as or larger than movie theaters.

The Court of Appeal's decision makes the constitutional validity of a classification of businesses dependent on circumstances over which a city has little, if any, control – business owners' locational preferences and consumer preferences for one type of entertainment over another. Neither *Minneapolis Star* nor any other case sanctions this method of testing the constitutional validity of a tax classification.

3. AS THE TAX IS BEING IMPOSED FOR THE SPECIFIC PURPOSE OF PROVIDING PUBLIC SERVICES TO THE BUSINESSES TAXED, THE CITY HAS MET ITS BURDEN OF JUSTIFICATION

It is no secret that since January 1, 1979, the effective date of Proposition 13, the Howard Jarvis-sponsored constitutional amendment which drastically limited the

amount of ad valorem property taxes available to California cities, the money available to finance municipal services and improvements in California cities has dwindled alarmingly. The Court of Appeal has interpreted this Court's opinion in *Minneapolis Star* so that yet another potential source of revenue to pay for vital public services has been cut off.

The effect of the Court of Appeal decision is to exempt a significant number of commercial enterprises from the payment of taxes needed to defray the cost of providing municipal services to these businesses. The First Amendment does not require that certain commercial businesses be given special treatment for taxation purposes. (See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. at 705 ["neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities."].)

Unlike the Minnesota tax, the tax imposed by the Ordinance is not for general revenue raising purposes. Rather, the taxes are used to pay for the public services provided to the businesses taxed. The Ordinance thus is similar to that upheld in *Cox v. New Hampshire*, 312 U.S. 569 (1941) [license fee exacted to meet the expense incident to the administration of the law and maintenance of public order in the matter licensed]; see also *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) "[The question] in determining the constitutionality of [a] license tax is whether the [municipality] has given something for which it can ask a return"]; and see *Metropolis Theatre Company v. City of Chicago*, 228 U.S. at 69 ["there is a

natural relation between the price of admission and revenue"]; *Fox v. City of Bakersfield*, 36 Ca1.2d at 144 ["those taxed are the ones where larger groups of people are likely to gather, with the accompanying effects on the functioning and activities of government."].)

Without the services and protection afforded by the City, the theaters could neither exist nor function. The attraction of large crowds of people on evenings and weekends requires the provision of additional governmental services in off hours. A tax designed to offset the cost thereof by the businesses which create the need justifies the burden of taxation, especially in these times of municipal financial hardship brought about by Proposition 13.

Because the tax is based on gross receipts measured by the number of people entering the premises, and the revenue raised by the tax is used to provide public services to the very business which create the need therefor, the tax is constitutional.

4. THIS CASE PRESENTS FIRST AMENDMENT QUESTIONS SIMILAR TO THOSE PRESENTED IN A CASE PENDING BEFORE THE COURT, *JIMMY SWAGGART MINISTRIES V. BOARD OF EQUALIZATION*

This case presents questions similar to those presented in *Jimmy Swaggart Ministries v. Board of Equalization*, 204 Cal.App.3d 151 (1988) *prob. juris. noted*, 57 U.S.L.W. 3687 (April 17, 1989) (No. 88-1374).)

The tax imposed by the Ordinance, like the use tax at issue in *Swaggart*, is not imposed on the business owner;

rather, it is collected from the patron for the privilege of being a spectator at theaters and the other places of amusement covered by the tax. (Section 3-5.506, App. B3-4); *Jimmy Swaggart Ministries v. State Bd. of Equalization,* 204 Cal.App.3d at 164.)

Additionally, this case involves, as does *Swaggart,* the question of the standard of review to be applied when a facially nondiscriminatory tax is challenged by a business which enjoys First Amendment privileges. (204 Cal.App.3d at 163-165.)

CONCLUSION

The Court of Appeal's decision has deeply eroded one of the most fundamental and necessary of municipal powers – the power to classify for purposes of taxation. While today only California cities are directly impacted by the decision, it surely will be used by the national conglomerates who own and manage most movie theaters to strike down admissions taxes in the hundreds, if not thousands, of cities across the country which have adopted them and rely on them for revenue.

The decision in this case, if left standing, will deprive a great many cities in California and, eventually, across the country, of yet another source of much-needed revenue, while permitting other, usually larger cities to continue to impose admissions taxes based solely on the fact that those jurisdictions contain popular non-First Amendment amusement businesses which share the burden of taxation with movie theaters and other businesses which enjoy First Amendment privileges. The Court should take

this opportunity to clarify that *Minneapolis Star* does not authorize movie theaters to use the First Amendment as a shield to avoid nondiscriminatory taxes needed to pay for the municipal services these businesses require.

For the foregoing reasons, the City respectfully requests that the Court grant this Petition for Writ of Certiorari.

EUGENE DEMCHUK, City Attorney
City of Montclair, and
BURKE, WILLIAMS & SORENSEN,
Special Counsel
J. ROBERT FLANDRICK
VIRGINIA PESOLA

J. ROBERT FLANDRICK
Attorneys for Petitioner
City of Montclair

DATED: August 21, 1989

APPENDIX A

[No. E005085. Fourth Dist., Div. Two. Mar. 10, 1989.]

[As modified Mar. 31, 1989.]

UNITED ARTISTS COMMUNICATIONS, INC., et al., Plaintiffs and Appellants, v.
CITY OF MONTCLAIR et al., Defendants and Respondents.

OPINION

McDANIEL, J. – United Artists Communications, Inc., Vista Theaters, Inc., and General Cinema Theatre Corporation of California (plaintiffs) have appealed from a judgment in favor of the City of Montclair (City) and Ned Crutcher, City's director of finance (collectively defendants), which was entered following a trial to the court of plaintiff's action for declaratory and injunctive relief related to the constitutionality of the City's admissions tax.

FACTS

In October 1986, the City of Montclair passed Ordinance No. 86-630, which added article 5 to chapter 5 of title 3 of the Montclair Municipal Code.

Article 5, known as the "Admissions Tax Law of the City of Montclair," imposes a 6 percent tax[1] on the price of "an admission ticket for the privilege of admission to any event held." (§ 3-5.504.)

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[1] Or the integrated sales tax rate applicable in San Bernardino County, whichever is greater.

Events are defined as "motion pictures, theatrical performances, musical performances, operas, athletic contests, exhibitions of art or handicrafts or products, lectures, speeches, fairs, circuses, carnivals, menageries, or any other activity conducted for which an admission ticket is sold for the privilege of viewing such activity." (§ 3-5.503(2).)

Events conducted for the benefit of charitable purposes, and events conducted for the benefit of churches, schools, and religious, charitable, fraternal, educational, military, state, county or municipal organizations or associations are exempt for so long as no profit from the event accrues to any individual. (§ 3-5.529.)

The purpose of Ordinance No. 86-630 was declared to be "to raise revenue to assist in covering the cost of providing municipal services required by businesses covered under this article."

The plaintiffs own, operate, and/or serve as managing agents for two movie cinemas located in City. In addition to these cinemas, other businesses in City are potentially subject to the admissions tax: the Holiday Skating rink, the Laff Stop, the Grand Prix Raceway, four nightclub/restaurants which charge cover charges, and two adult bookstores with viewing booths. At present, however, and as stipulated to by the parties, 90 percent of the admissions tax will be borne by the two movie theaters and the two adult bookstores.

Plaintiffs filed a complaint for declaratory and injunctive relief on the ground that the admissions tax impermissibly burdens their First Amendment rights. Plaintiffs also requested, and were granted, a temporary

restraining order against the imposition of the tax, upon condition that they post a bond.

Following a hearing on stipulated facts on plaintiffs' request for a preliminary injunction, the trial court determined that tax to be constitutional. The temporary restraining order was dissolved; whereupon judgment was entered in favor of defendants.

Plaintiffs have appealed and assert that Ordinance No. 86-630 impermissibly burdens constitutionally protected activities, without adequate justification, in violation of the rule set out in *Minneapolis Star v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575 [75 L.Ed.2d 295, 103 S.Ct. 1365]. After reviewing the authorities cited by both parties, we agree with plaintiffs that this tax does not pass constitutional muster and accordingly we must reverse the judgment.

Discussion

In *Minneapolis Star v. Minnesota Comm'r of Rev., supra,* 460 U.S. 575 [75 L.Ed.2d 295, 103 S.Ct. 1365] the Minneapolis Star and Tribune Company instituted an action in state court to seek refund of part of certain use taxes it had paid on the cost of ink and paper used to produce its newspaper. The challenged tax provided for a special use tax on the cost of ink and paper used to produce publications which were otherwise exempted from the state's general sales tax. The first $100,000 of such costs in any calendar year was exempted from the use tax. The practical result of this exemption was that (1) only a very small

percentage of publishers paid any tax, and (2) the Minneapolis Sun by itself paid two-thirds of the total tax collected.

The Sun argued that the imposition of the tax violated respectively the First and Fourteenth Amendments' guaranties of freedom of the press and equal protection. The Supreme Court of Minnesota upheld the tax against this federal constitutional challenge, but the United States Supreme Court reversed, holding that the tax violated the First Amendment in two separate ways: (1) by singling out only the press for the special use tax and (2) by targeting, via the $100,000 exemption, only a few members of the press. (460 U.S. at pp. 591-592 [75 L.Ed.2d at pp. 308-309, 103 S.Ct. at p. 1375].)

The fact that there was no evidence that the state of Minnesota had intended to target a given publisher or to restrict free exercise of First Amendment rights was deemed irrelevant by the court. (460 U.S. at pp. 592-593 [75 L.Ed.2d at p. 309, 103 S.Ct. at p. 1376].) Instead, the relevant question was whether Minnesota could show that the discriminatory tax scheme was necessary to serve a compelling state interest which could not be achieved without differential taxation. (460 U.S. at pp. 582-585 [75 L.Ed.2d at pp. 303-305, 103 S.Ct. 1365 at pp. 1370-1372].) Moreover, although the court concluded that Minnesota's interest in raising revenue was "critical," it held that such interest, standing alone, did not justify its special treatment of the press, when it could raise revenue by taxing businesses generally. (460 U.S. at p. 586 [75 L.Ed.2d at p. 305, 103 S.Ct. at p. 1372].)

The holding in *Minneapolis Star* has already been applied by California courts, where they have declared similarly discriminatory city ordinances to be unconstitutional.

In *City of Alameda v. Premier Communications Network, Inc.* (1984) 156 Cal.App.3d 148 [202 Cal.Rptr. 684], the City of Alameda had enacted an ordinance which imposed a business license tax of 3 percent of annual gross receipts on television subscription service businesses and emergency communications systems and alarms.

For failure to pay the tax the city filed suit against Premier Communications Network, Inc. (Premier) a multipoint distribution service engaged in the "pay T.V." business. Premier admitted nonpayment, denied liability on the ground that the tax violated the First Amendment, and cross-complained to enjoin enforcement of the ordinance. The trial court entered judgment declaring the ordinance unconstitutional and enjoining its enforcement. On appeal, the First District modified the judgment to declare that the ordinance was unconstitutional as it applied to Premier, and to enjoin its enforcement with respect to Premier only.

To reach this result, the reviewing court first reiterated the basic rule that Premier, "as a disseminator of motion pictures, news, and other information and entertainment programming, engages in conduct protected by the First Amendment guaranties of freedom of speech and press." (*Id.*, at p. 152, to the same effect, see *Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61, 65 [68 L.Ed.2d 671, 678, 101 S.Ct. 2176]: "Entertainment, as well

as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. [Citations.]".)

The court then considered the structure of the challenged ordinance, which imposed an annual business license tax on 87 types of businesses, using four methods: a flat fee, a per unit fee, a flat fee plus a sum based on the number of employees, and a fee tied to gross receipts. Only four businesses paid fees under the fourth method, i.e., tied to gross receipts: outdoor advertisers, drive-in-theaters, television subscription service businesses, and emergency communications systems or alarms businesses.

Although businesses were subject to the imposition of one of these four methods, the ordinance also provided an *optional* method of taxation – an "in lieu" license fee based on gross receipts – to all but ten types of businesses. All four businesses whose license fee were tied to gross receipts were excluded from electing to pay the "in lieu" fees, as were six other businesses; of those six, five paid fees subject to a ceiling, the highest ceiling being $600, and the sixth category of business, persons leasing hotels or office buildings, paid $4 per room. The "in lieu" tax schedule ranged from $.30 per $1,000 to $2.25 per thousand of gross receipts, compared to the $30 per thousand imposed on Premier.

The court then considered the *practical* result of the tax structure on Premier and concluded that Premier, with annual gross receipts of $210,000, was taxed more

harshly than other businesses. More particularly, Premier's business license fee for one year would have been $6,300, whereas another category of business with the same receipts, under the highest level of the "in lieu" tax schedule, would have paid no more than $472.50 ($2.25 per $1,000, or less than one-thirteenth of the 3 percent tax rate imposed on Premier).

After determining that the ordinance created a differential tax burden, the court then reviewed the holding in *Minneapolis Star;* it then concluded, under the teachings of that case, that the business license tax on television subscription service businesses, as applied to Premier, failed to pass constitutional muster because it was differentially burdensome to the press, and because the only interest asserted by the city to justify the differential tax burden was the generation of revenue. The court concluded that this was not a sufficiently compelling interest to justify special treatment of the press.

More recently, in *Festival Enterprises, Inc. v. City of Pleasant Hill* (1986) 182 Cal.App.3d 960 [227 Cal.Rptr. 601], the first district was asked to invalidate an ordinance very similar to the ordinance under review here.

In *Festival Enterprises,* the City of Pleasant Hill had enacted a 5 percent tax on admission fees for events including, but not limited to: " '[b]asketball, softball, baseball football, or wrestling exhibits, circuses, carnivals, or similar exhibits, ice or roller skating shows, museums, public hall, club room, assembly hall, theater, auditorium or concert hall where any type of entertainment, amusement, concert or performance is given or held, motion picture theaters, horse shows, rodeos, air

shows, etc.' " (*Id.*, at p. 962, fn. 1.) The tax was enacted to provide revenue for needed street repairs and was one of three new taxes designed to fill this need.

Although the ordinance was broadly worded to apply to other forms of entertainment, the theaters owned by Festival Enterprises, Inc., were the *only* businesses which were affected by the tax.

Festival Enterprises, Inc., filed a complaint for declaratory and injunctive relief claiming that Pleasant Hill's admissions tax unconstitutionally interfered with protected free speech and that it violated the proscription of article XIIIA, section 4 of the California Constitution (Proposition 13). The trial court found the tax to be an impermissible burden on free speech, in violation of the federal Constitution, and it declined to determine whether the tax also violated the state Constitution.

On appeal, relying on *Minneapolis Star* and its own earlier decision in *City of Alameda* the first district held that the tax, as applied to the theater owners, *did* violate the First and Fourteenth Amendments of the federal Constitution, for the following reasons: (1) the theater owners were expected to bear the entire impact of the admissions tax, not only currently, but for the foreseeable future;

(2) the admissions tax was not a broadly based tax applicable to businesses in general, but was designed to apply only to amusement and entertainment businesses.

(3) the main interest in imposing the tax was to raise revenues; and

(4) the city did not contend that the operation of the theaters created an additional need for revenue because of increased use of city services. (*Id.*, at p. 964.)

The City of Pleasant Hills argued that the tax was valid because it imposed a uniform rate for *all* businesses that charged an admission fee. However, the court gave this argument short shrift, noting that the gravamen of a differential tax treatment upon protected activity is the *threat* that discriminatory taxes may be effectively used to censor unpopular expression. (*Id.*, at pp. 964-965.) Implicit in its statement was the idea, set forth in *Minneapolis Star*, that a tax which is facially neutral but which actually operates in a discriminatory manner, is not truly neutral or uniform.

This point was reemphasized by the United States Supreme Court in *Acara v. Cloud Books, Inc.* (1986) 478 U.S. 697 [92 L.Ed.2d 568, 106 S.Ct. 3172], in which the court characterized its earlier decision as follows: "In *Minneapolis Star* . . . we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax *had the effect* of singling out newspapers to shoulder its burden. We imposed a greater burden of justification on the State even though the tax was imposed upon a nonexpressive activity, *since the burden of the tax inevitably fell disproportionately – in fact, almost exclusively – upon the shoulders of newspapers exercising the constitutionally protected freedom of the press.*" (478 U.S. at p. 704 [92 L.Ed.2d at p. 576, 106 S.Ct. at p. 3176] italics added.)

(1a) Here, just as in *Minneapolis Star* and *Festival Enterprises*, the tax in question appears to apply to a broad range of businesses, but in reality its burden falls

disproportionately upon businesses engaged in protected speech: two theaters and two adult book stores with viewing booths. Although, unlike the case in *Festival Enterprises*, there are a few other businesses in Montclair which are actually affected by the ordinance, this difference alone cannot save the tax from the stigma of unconstitutionality. First, as in *Minneapolis Star*, a disproportionate amount of tax (90 percent) is paid by only a few businesses. Second, as plaintiffs here point out, even the other few businesses subject to the tax may avoid it – the roller rink by dropping its admission fee and by instead increasing its skate rental fee, and the nightclubs by dropping their admission fee and instead instituting a minimum drink or dinner charge – whereas plaintiffs, who are bound by distribution agreements, do not have such a readily available means to avoid an admissions tax. Third, at least some of the other businesses subject to the tax, e.g., the nightclub/~~resta~~urants, would also appear to be engaged in, or likely to engage in, protected speech, and the fact that they too are among the few businesses actually subject to the tax does not help defendants' position.

Defendants seek to avoid the holdings of *Minneapolis Star* and *Festival Enterprises* by citing *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540 [76 L.Ed.2d 129, 103 S.Ct. 1997], which held, in the context of an equal protection challenge, that the taxpayer bears the burden of demonstrating that a tax classification oppressively discriminates against a particular person or class, and *Times Mirror Co. v. City of Los Angeles* (1987) 192 Cal.App.3d 170 [237 Cal.Rptr. 346], which held that the

government may subject the press to generally applicable economic regulations and taxes.

However, the holdings in those cases do not allow or require us to affirm the decision below, as plaintiffs' uncontradicted evidence demonstrates that the tax challenged here *does* discriminate against those engaged in protected speech, and is not one of general applicability, as it is not targeted at all businesses. Indeed, despite its broadly worded applicability, the tax falls almost entirely upon only four businesses, *all* of which are engaged in protected speech. (2) As has been pointed out by the United States Supreme Court on numerous occasions, a statute challenged under the First Amendment "must be tested by its *operation and effect.*" (*Near v. Minnesota* (1931) 283 U.S. 697, 708, [75 L.Ed. 1357, 1363, 51 S.Ct. 625, 628], italics added, and see also *Schneider v. State* (1939) 308 U.S. 147, 161 [84 L.Ed. 155, 164-165, 60 S.Ct. 146, 151]; *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 68 [68 L.Ed.2d 671, 679-680, 101 S.Ct. 2176, 2182].)

(1b) Therefore, based on the holding of *Minneapolis Star* and *Festival Enterprises, Inc.,* we hold that the tax in question is unconstitutional as applied to plaintiffs.

DISPOSITION

The judgment is reversed, and the trial court is directed to enter judgment declaring Ordinance No. 86-630 unconstitutional as applied to plaintiffs and enjoining its enforcement with respect to them.

Campbell, P. J., and Dabney, J., concurred.

APPENDIX B

ORDINANCE NO. 86-630

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MONTCLAIR ADDING ARTICLE 5 TO CHAPTER 5 OF TITLE 3 OF THE MONTCLAIR MUNICIPAL CODE RELATING TO AN ADMISSIONS TAX

The City Council of the City of Montclair does ordain as follows:

Section 1: Amendment of Code – Chapter 5 of Title 3 of the Montclair Municipal Code is hereby amended by adding Article 5 thereto to read as follows:

Article 5. Admissions Tax

Section 3-5.501. Title.

This article shall be known as the "Admissions Tax Law of the City of Montclair."

Section 3-5.502. Purpose.

It is hereby declared as a matter of public policy that the provision of adequate municipal services is in the interest of the public health, safety and general welfare. The purpose of this article is to raise revenue to assist in covering the cost of providing municipal services required by businesses covered under this article.

Section 3-5.503. Definitions.

(1) "Admission ticket" shall mean any charge whether or not so designated for the right or privilege to enter and occupy a seat or space as hereinafter defined.

(2) "Event" shall mean motion pictures, theatrical performances, musical performance, operas, athletic contests, exhibitions of art or handicrafts or products, lectures, speeches, fairs, circuses, carnivals, menageries, or any other activity conducted for which an admission ticket is sold for the privilege of viewing such activity.

(3) "Operator" shall mean persons conducting, operating, or maintaining in whole or in part as principal, agent, officer, employee and/or independent contractor any event, admission to which is taxable under this chapter.

(4) "Patron" shall mean any person who pays or on account of whom is paid any charge or admission price for the right or privilege of being admitted for the purpose of attending any event.

(5) "Premises" shall mean and include any building, structure or place location wherein or at which an event as defined herein can be held.

Section 3-5.504. Tax Imposed.

When a charge or admission price for admission is paid for the right or privilege of being admitted to any premises, there is hereby levied and assessed, and there shall be paid and collected, a tax in an amount equal to six (6) percent *or the integrated sales tax rate in San Bernardino County, attributable to all state and local sales taxes, whichever is greater on* the price of an admission ticket for the privilege of admission to any event held.

Section 3-5.505. Passes/Tax Imposed

(a) When admittance is allowed by free pass to any premises for the purpose of attending any event thereat, there is hereby levied and assessed and there shall be paid and collected a tax of twenty-five cents (25¢) for each admittance by free pass.

(b) If admission to any premises or event is under or by virtue of a season pass for which any charge or admission price has been paid, the tax due thereon shall be paid and collected at the time and place that such season pass is purchased. The rate of the tax on each such season pass shall be that rate which is made applicable by Section 3-5.503 *hereinabove* to the quotient of the total amount paid for such season pass divided by the total number of events to which such season pass entitles the holder or owner thereof to be admitted. The amount of the tax on such season pass shall be the product of such rate multiplied by the total number of events to which such season pass entitled the holder or owner thereof to be admitted, and shall be due and payable and paid and collected at the time such season pass is purchased.

(c) In the case of persons having permanent access to any premises for the purpose of attending any event thereat, a tax equivalent to the tax imposed by Section 3-5.503 *hereinabove* based on the amount for which a similar seat is sold for each event, is hereby levied and assessed and shall be collected and paid for each event for which the seat is thus reserved.

Section 3-5.506. Payable By Whom.

The tax levied and assessed by or under this article is hereby imposed upon each person or patron by or on account of whom payment is

made for admission or a free pass granted to any premises or portion thereof, and shall be paid by or on account of such person at the time and at the place when the charge or admission price is paid, or if admittance is by a free pass, before entry is allowed.

Section 3-5.507. Collectible By Whom.

The tax imposed by this article shall be collected for the City by the operator at the time and place where the tax is due and payable, and thereafter shall be accounted for and paid over to the City by such operator at the time and in the manner in this article hereinafter specified.

Section 3-5.508. Time of Accounting.

Every operator shall account for all taxes imposed or collected under this article at the time or times set forth in the following:

(a) If an event subject to the tax imposed by this article is scheduled by the operator to be held for a period of less than seven (7) days, the operator shall account to the City in the manner specified in this article within twenty-four (24) hours after the completion of each such single event.

(b) If any event subject to the tax imposed by this article is scheduled by the operator to be held for a period of more than seven (7) days but less than thirty (30) days, the operator shall account to the City in like manner on each Monday for all preceeding events for which no accounting has been made as herein provided.

(c) If any event subject to the tax imposed by this article is scheduled by the operator to be held for a period of more than thirty (30) days, the operator shall account to the City in like

manner on the twentieth (20th) day of each calendar month for all events thus conducted by him from the first (1st) to the fifteenth (15th) calendar days of such month, and on the fifth (5th) day of each calendar month for all events thus conducted by him from the sixteenth (16th) calendar day to the last calendar day of the preceeding calendar month.

(d) Nothing in the preceeding subsections shall preclude an operator from accounting more frequently or upon a date earlier than herein specified.

Section 3-5.509. Manner of Accounting/ Statement.

At the times required by the preceeding subsections, every operator shall file with the City Treasurer a written statement setting forth the number of admissions to the premises for which a charge or admission price was paid, the number of season passes and the price or admission charge paid for such season passes to the premises, the total number of leased seats at the premises or leases of any portion of the premises purchased or paid for, the total number of events to which such season passes entitled the owner or holder thereof to admission, the total number of free passes issued and the total number of events to which such free passes entitled the owner of holder thereof to admission, the total number of events at which such leased seats entitle the purchaser of holder thereof to the use of accommodations or any portion of the premises, and a statement of the total taxes due under the terms of this article upon each of the foregoing, the period of time covered by the accounting and such other information as may be required by the City Treasurer for a proper understanding of such statement

and a complete audit of the taxes due thereunder.

Such accounting statement shall be dated, subscribed by the individual making the statement, stating the capacity in which the signer makes the same, and the signer shall certify, under penalty of perjury, that the statements made therein are, to the best of his information, knowledge and belief, true and correct.

Section 3-5.510. Payment with Statement.

Such accounting statement shall be accompanied by payment, in legal tender or in other form approved by the City Treasurer, of the total amount of taxes shown in said statement to be due and payable under the terms of this article for the period thus accounted for, plus all penalties that may be due thereon as prescribed in this article.

Section 3-5.511. Alternate Procedure.

Upon the filing by an operator with the City Administrator of a written application setting forth good cause for a modification of the time and manner of accounting for and payment of taxes due under this article, the City Administrator may, in writing, authorize such operator to account for and to pay over to the City Treasurer all taxes due, payable or paid under the provisions of this article at a time or times and in a manner other than those specified in this article.

Section 3-5.512. Penalties and Interest.

(a) The failure of an operator to pay to the City Treasurer the entire amount of taxes due

under the provisions of this article at the time and in the manner herein prescribed, shall automatically cause the amount of such taxes then unpaid forthwith to become and be delinquent, and a penalty of ten percent (10%) of the taxes so delinquent shall be added and paid by the operator to the City Treasurer at the time of accounting or payment.

(b) Any operator who fails to remit any delinquent remittance on or before a period of thirty days following the date on which the remittance first became delinquent shall pay an additional delinquency penalty of ten percent of the amount of the tax and for each thirty-day period or fraction thereof of delinquency thereafter. The total delinquency shall not exceed fifty percent of the tax imposed.

(c) If the City Treasurer determines that the nonpayment of any remittance due under this chapter is due to fraud, a penalty of twenty-five percent of the amount of the tax shall be added thereto in addition to the penalties stated in subsections (a) and (b) *hereinabove*.

(d) In addition to the penalties imposed, any operator who fails to remit any tax imposed by this chapter shall pay interest at the rate of one half of one percent per month or fraction thereof on the amount of the tax exclusive of penalties and interest from the date on which the remittance first became delinquent until paid.

(e) Every penalty imposed and such interest as accrues under the provisions of this chapter shall become a part of the tax herein required to be paid.

Section 3-5.513. Posting of Bonds.

Every operator shall, before engaging in any business, admission to any premises, portion or event of which is subject to the tax imposed by this article, post with the City Treasurer a cash bond equal to the amount of the maximum tax payable by patrons thereof multiplied by the total seating capacity of the premises, multiplied by the number of events scheduled thereat.

(a) In computing the cash bond, no more than the total number of events within any one accounting period shall be used.

(b) No such bond shall be required in the event the operator owns the premises upon which such business is to be conducted.

Section 3-5.514. Forfeiture of Bond.

If the operator fails to account at the time and in the manner required by this article, or if the operator fails to permit inspection of his records when demand for such inspection is made by the City Treasurer, the City Council may, upon notification of any such facts, declare such operator's cash deposit forfeited.

Such forfeiture shall not relieve the operator from liability for any taxes due upon admissions to any event conducted by him.

Section 3.5.515. Return of Bond.

Upon the expiration of the period for which any event shall have been scheduled by the operator, and upon certification by the City Treasurer that all accounts required of an operator under this article have been made by the operator and audited by the City Treasurer and that all taxes and penalties due thereunder have been paid over to the City, the City Council shall

cause all cash bonds theretofore deposited by the operator with the City under this article and not previously declared forfeited as hereinbefore provided, to be refunded to the operator in the manner and form provided for other City warrants.

Section 3-5.516. Duty of Performance.

Any act required by this article to be performed by an operator shall be performed by each person included in the definition of operator; provided, however, that performance by any one such person shall be deemed performance by all such persons.

Section 3-5.517. Tax Deemed a Debt.

The amount of any tax or any penalty imposed by this article shall be deemed a debt to the City, and any operator violating any of the provisions of the article shall be liable to an action in the name of the City in any court of competent jurisdiction for the amount of taxes and penalties imposed by this article, and attachment shall issue on verified complaint without any bond or affidavit given or required on behalf of plaintiff.

Section 3-5.518. Tax/Not In Lieu.

The tax imposed by this article is in addition to any other tax, license or permit fee that may be required of any person by any ordinance or other section of this Code.

Section 3-5.519. Failure to Collect.

If any operator required to collect and remit the tax imposed by this chapter fails to file a return and a remittance, the City Treasurer shall proceed in such manner as deemed best to

obtain facts and information on which to base an estimate of the tax due. As soon as the City Treasurer obtains such facts and information on which to base the assessment of any tax imposed by this article and payable by any operator who has failed or refused to collect the same and to make such report and remittance, the City Treasurer shall proceed to determine and assess against such operator the tax, interest and penalties provided for by this article.

Section 3-5.520. Deficiency Determination.

If the City Treasurer has reasonable cause to believe the return or returns of the amount of tax required to be paid to the city by any operator are erroneous, the City Treasurer shall compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information available or that may come into the City Treasurer's possession. One or more deficiency determinations may be made of the amount due for one or more periods.

Section 3-5.521. Offsetting of Overpayment.

In making a determination pursuant to Sections 3-5.518 and 3-5.519, the City Treasurer may offset any overpayments for a period or periods against underpayments for another period or periods, against penalties, and against the interest on underpayments.

Section 3-5.522. Notice of Determination.

The City Treasurer shall give to the operator written notice of any determinations made pursuant to Sections 3-5.518 and 3-5.519. This notice may be served personally or by depositing in the United States Postal Service, postage prepaid, and addressed to the operator at his address as it appears in the records of the City Treasurer. In case of service by mail of any notice required under this chapter, the service is complete at the time of deposit of the notice.

Section 3-5.523. Hearing.

Any operator served pursuant to Section 3-5.521 may within fifteen days after service or mailing of such notice, make application in writing to the City Treasurer for a hearing to review the amounts determined and assessed under Sections 3-5.518 and 3-5.519. If application by the operator for a hearing is not made within the time prescribed, the tax, interest, and penalties, if any, determined by the City Treasurer shall become final and conclusive and immediately due. Any operator against whom interest or penalties have been assessed pursuant to Section 3-5.511 may make an application in writing for a hearing with the City Treasurer to review the amounts of tax owing and accrued penalties and interest thereon within thirty days after notice of delinquency. If such application is made, the City Treasurer shall give not less than five days' written notice in the manner prescribed by Section 3-5.521 to the operator to show cause at a time and place fixed in such notice why such amount specified therein should not be assessed including such tax interest and penalties, if any. At such hearing, the operator may appear and offer evidence why

such specified tax, interest and penalties should not be so fixed. After such hearing the City Treasurer shall determine the proper tax together with interest and penalties thereon to be remitted and shall thereafter give written notice thereof to the operator in the manner prescribed in Section 3-5.521. The amount determined to be due shall be payable after fifteen days unless an appeal is taken as provided in Section 3-5.523.

Section 3-5.524. Appeal.

Any operator aggrieved by any decision of the City Treasurer with respect to the amount of such tax or interest and penalties, if any, may appeal to the City Council by filing a notice of appeal with the City Clerk within fifteen days of the serving or mailing of the determination of tax due. The Council shall fix a time and place for hearing such appeal, and the City Clerk shall give notice in writing to such operator at his last known place of address. The decision of the Council shall be final and conclusive. Any amounts determined, shall be due and payable upon the service of notice of the decision pursuant to Section 3-5.521.

Section 3-5.525. Records.

Every operator liable for the collection and payment to the city of any tax imposed by this article shall keep and preserve all records as may be necessary to determine the amount of such tax as he may have been liable for the collection of and payment to the city. The City Treasurer may examine the books, papers, records and equipment of any operator liable for the tax imposed by this chapter and may investigate the character of the business of the operator in order to verify the accuracy of any return

made, or if no return is made by the operator, to ascertain and determine the amount required to be paid.

Section 3-5.526. Refund.

(a) Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once or has been erroneously or illegally collected or received by the city under this chapter, it may be refunded as provided herein; provided, that a claim in writing therefore, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the City Treasurer within one year of the date of payment.

(b) Any operator may claim a refund or take as credit against taxes collected and remitted any amount overpaid, paid more than once or erroneously collected or received. Neither a refund nor a credit shall be allowed unless the amount of the tax so collected has either been refunded to the patron or credited to admission subsequently payable by the patron to the operator.

(c) A patron may obtain a refund of taxes overpaid or paid more than once or erroneously collected or received by the city by filing a claim in the manner provided in subsection (a), but only when the tax was paid by the patron directly to the City Treasurer or when the patron, having paid the tax to the operator, establishes to the satisfaction of the City Treasurer that the patron has been unable to obtain a refund from the operator who collected the tax.

(d) No refund shall be paid unless the claimant establishes his or her right thereto by written records showing entitlement thereto.

Section 3-5.527. Compliance Not Excused by Prosecution.

The conviction or punishment of any person for the violation of any provision of this article shall not excuse or exempt such person from payment of any license, tax, fee or penalty due or unpaid under this article or under any other provision of this Code or any ordinance.

Section 3-5.528. Waiver of Tax

The City Council may at any time, by minute action, waive any or all of the requirements of this article with respect to any business or event which is conducted or sponsored within the City.

Section 3-5.529. Exemptions.

The provisions of this article shall not be deemed or construed to require the payment of an admissions tax when the conduct of the activity is by an institution or organization existing wholly for the benefit of charitable purposes; nor shall any admissions tax be required if the entertainment, concert, exhibition, or lecture on scientific, historical, literary, religious, or moral subject within the City from which the receipts are to be appropriated to any church or school or to any religious or benevolent purpose; nor shall an admissions tax be required if an entertainment, dance, concert, exhibition, or lecture by any religious, charitable, fraternal, educational, military, state, county, or municipal organization or association conducts the activity and the receipts of such entertainment, dance, concert, exhibition, or lecture are to be appropriated for the purpose and objects for which such organization or association was formed and from which profit is not derived, either directly

or indirectly, by any individual; provided, however, nothing in this section shall be deemed to exempt any such organization or association from complying with any of the provisions of the Montclair Municipal Code requiring a permit from the Council or any commission or officer to conduct, manage, or carry on any activity.

Section 3-5.530. Disposition of Funds.

All taxes and penalties thus received shall be deposited in the General Fund.

Section 2: Validity - If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such holding or holdings shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Section 3: Publication - The City Clerk shall cause this ordinance to be published in **The Daily Report** at least once within fifteen (15) days after its passage.

_____

Mayor

ATTEST:

_____

City Clerk

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Two,
No. E005085, S009859

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

Filed May 24, 1989

UNITED ARTISTS COMMUNICATION INC. Et Al., Appellants

v.

CITY OF MONTCLAIR Et Al., Respondents

Respondent's petition for review DENIED.

LUCAS
Chief Justice

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(2)

Case No. 89-316

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CITY OF MONTCLAIR, a California City,
Petitioner,

VS.

UNITED ARTISTS COMMUNICATIONS, INC.,
VISTA THEATERS, INC., and
GENERAL CINEMA THEATRE CORPORATION OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LILLICK & CHARLES
BARRY J. LONDON
LESLEY B. HARRIS
Two Embarcadero Center
Suite 2600
San Francisco, CA 94111
Telephone: (415) 984-8200
Attorneys for Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

13 pp

QUESTION PRESENTED

Does the First Amendment, as interpreted by this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, prohibit a city from imposing an admissions tax, such that more than ninety percent (90%) of the burden is borne by three (3) movie theaters?

LIST OF PARTIES

The parties to the proceedings below were the petitioner City of Montclair and respondents United Artists Communications, Inc.; Vista Theaters, Inc.; and General Cinema Theatre Corporation of California.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Code

Constitutions

Case No. 89-316

In the Supreme Court

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OCTOBER TERM, 1989

CITY OF MONTCLAIR, a California City,
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VS.

UNITED ARTISTS COMMUNICATIONS, INC.,
VISTA THEATERS, INC., and
GENERAL CINEMA THEATRE CORPORATION OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I

STATEMENT OF THE CASE

In October, 1986, Petitioner City of Montclair (hereafter "City") passed Ordinance No. 86-630 amending Chapter 5 of Title 3 of the Montclair Municipal Code by adding Article 5 thereto to impose an admissions tax. The ordinance imposed a 6% tax on all tickets sold for admission and on admission fees charged for certain prescribed activities.

In addition to Respondents' theatres, the parties stipulated that no more than nine (9) other business entities located in Montclair were potentially subject to the admissions tax: the Holiday Skating Rink, the Laff Stop, the Grand Prix Raceway (when operating), four nightclubs/restaurants that charge an entrance or "cover charge" (the Black Angus Restaurant, Casa Vallarta, Ami Hacienda, and the Green Door), and two adult book stores with

viewing booths (the Apple Adult Bookstore and Paradise Video). (Stipulation of Facts, ¶ 13).

The parties also stipulated to an estimate that not less than ninety percent (90%) of the admissions tax liability would be borne by Respondents' theatres. Other taxpayers exercising First Amendment rights such as the adult bookstores with viewing booths, would also be affected. (Stipulation of Facts, ¶ 14).

REASONS FOR DENYING THE WRIT

1. THE QUESTION PRESENTED IN THIS CASE HAS ALREADY BEEN DECIDED BY THIS COURT IN *MINNEAPOLIS STAR V. MINNESOTA COMMISSIONER OF REVENUE*, AND THE LOWER COURT CORRECTLY INTERPRETED AND APPLIED THAT HOLDING

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), this Court addressed the very same issue petitioner now brings before it: Is a tax which must be borne by only a handful of taxpayers whose activities are protected by the First Amendment constitutionally valid? The Court concluded it was not.

The Court stated two reasons for its holding: (i) the taxpayer's First Amendment rights were unduly burdened, and (ii) the narrow tax base upset the inherent check on the legislature and created a threat of censorship. The rationale applied in *Minneapolis Star* is equally applicable here. While the taxpayer challenging the tax in *Minneapolis Star* was a newspaper, respondent taxpayers, owners of movie theaters, are likewise protected by the First Amendment. *See Schad v. Bureau of Mt. Ephraim*, 452 U.S. 61, 65 (1981); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

A. A Tax Which Singles Out And Unduly Burdens First Amendment Activities Is Presumptively Invalid

A tax which differentiates among taxpayers engaged in First Amendment protected activities is presumptively unconstitutional absent a showing of overriding government interest. *Minneapolis*

Star, 460 U.S. at 575, 582. A tax which classifies taxpayers is suspect whether the classification appears on the face of the statute, arises from its application, or as a result of its impact. As recognized by this Court, a statute challenged under the First Amendment "must be tested by its *operation and effect.*" *Near v. Minnesota,* 283 U.S. 697, 708, 75 L.Ed.2d 1357, 51 S.Ct. 625 (1931) (emphasis added). Respondents do not dispute that Ordinance 86-630 is facially neutral, nor do they contend that the law would have been applied in a discriminatory manner. Rather, Respondents rely on the discriminatory impact the Ordinance would have if applied. It has been established that over ninety percent (90%) of the tax would fall upon Respondents. Clearly, the *effect* of the tax sets Respondents apart from other businesses in the City.

Petitioner contends that the circumstances surrounding the tax imposed on Respondents differ from the circumstances surrounding the newspaper in *Minneapolis Star.* Specifically, petitioner avers that the tax in *Minneapolis Star* did not pass constitutional muster because it (a) on its face applied only to businesses protected by the First Amendment, (b) contained an exemption for smaller businesses and (c) effectively "targeted" a small number of taxpayers. Petitioner claims that since the Ordinance contains no exemptions, it cannot be compared to the tax in *Minneapolis Star.*

The distinction relied upon by petitioner is inconsequential. This Court did not hold that the tax in *Minneapolis Star* was unconstitutional merely because of its terms, but rather because the *effect* of the tax resulted in a disproportionate burden on First Amendment taxpayers. *See Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 92 L.Ed.2d 568, 106 S.Ct. 3172 (1986) ("In *Minneapolis Star* . . . we struck down a tax imposed on the sale of large quantities of newsprint and ink because the tax *had the effect* of singling out newspapers to shoulder the burden"). The number of taxpayers affected by the tax in *Minneapolis Star* was fourteen (14), and two-thirds (⅔) of the entire tax fell upon the Minneapolis Star Tribune.

It is precisely that effect of the tax, that it falls on only a few taxpayers, which makes the Ordinance unconstitutional. Given

the present development of City, only twelve (12) businesses would be subject to the tax, and of the twelve (12), the three (3) Respondents would bear at least ninety percent (90%) of the entire tax. Thus, the burden on Respondents as a result of the admissions tax would be even greater than the burden on the Minneapolis Star Tribune as a result of the paper and ink tax.

As recognized by the Court below:

> Here, just as in *Minneapolis Star* . . . , the tax in question appears to apply to a broad range of businesses, but in reality its burden falls disproportionately upon businesses engaged in protected speech. . . .

United Artists Communications, Inc. v. City of Montclair, 209 Cal.App.3d 245, 252, 257 Cal. Rptr. 124 (1989).

B. A Tax Affecting Only A Handful Of Taxpayers Creates A Threat Of Censorship And Is Constitutionally Invalid

A tax that is not broad-based, i.e., levied against an appreciable number of constituents, provides no inherent protection to taxpayers against undue hardship. In the context of a tax against persons conducting activities protected by the First Amendment, a narrow tax base presents the additional problem of potential censorship. Where a First Amendment activity is curtailed, or where a group of taxpayers engaged in protected activities are singled out, either on purpose or in effect, the government must show a compelling interest to justify the scheme. *Minneapolis Star*, 460 U.S. at 592-593.

> When the State singles out the press . . . , the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. *Minneapolis Star*, 460 U.S. at 585.

In invalidating a tax affecting the exercise of First Amendment rights, the Court need not find that the tax was enacted for any

impermissible or censorial legislative motive. *Minneapolis Star,* 460 U.S. at 579-80, 592-93. "Abridgement of such rights, even though unintended, may invariably follow from varied forms of governmental action." *NAACP v. Alabama,* 357 U.S. 449, 461 (1958). Regardless of the statutory intent, when the application of a general revenue tax in the real world results in only a small number of First Amendment activities being taxed, the tax cannot stand: "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star,* 460 U.S. at 592.

C. Petitioner Has Failed To Make A Showing Of Overriding Governmental Interest Necessary To Uphold A Tax Which Falls Exclusively On First Amendment Taxpayers

Petitioner contends that one interest served by the ordinance is raising revenue. This Court has held, however, that a governmental interest in raising revenue cannot sustain a tax against First Amendment activities. *Minneapolis Star* at 586. In recognition of that well-established principle, petitioner asserts that the admissions tax is not a general revenue raising tax, but rather a tax to defray City's expenses in providing public service to the businesses taxed.

Petitioner's argument is unpersuasive. First, petitioner highlights the financial hardship facing municipalities as a result of Proposition 13. Proposition 13 limits the amount of property taxes available to California cities. Petitioner's portrayal of its financial plight, if anything, illustrates that the tax herein is a general revenue raising device and not one tailored to defray specific costs.

Moreover, Petitioner has provided no evidence that the ordinance was designed to compensate the City for municipal services to respondents and others affected by the tax. Specifically, petitioner contends that "the attraction of large crowds of people on evenings and weekends requires the provision of additional governmental services in off hours." *See* Petition for Writ of Certiorari at 15. Petitioner has failed to introduce any facts in support of its claim either in connection with this petition or in the lower

courts. Moreover, a broad based tax may raise any necessary revenue with less threat to First Amendment protected freedoms than the Ordinance.

Further, the tax would discriminate against establishments having admissions fees. For instance, restaurants or night clubs in the City that do not charge an entrance fee would not be subject to the tax. Theoretically, however, they attract crowds as large as restaurants and night clubs in other parts of the City which do charge an admission fee. Accordingly, the ordinance is not well-fashioned as a means to defray costs for governmental services. Rather, it is a general revenue-raising device.

2. THIS CASE DOES NOT PRESENT FIRST AMENDMENT QUESTIONS SIMILAR TO THOSE PRESENTED IN A CASE PENDING BEFORE THE COURT, *JIMMY SWAGGART MINISTRIES V. BOARD OF EQUALIZATION*

The issue before this Court in *Jimmy Swaggart Ministries v. Board of Equalization,* 204 Cal. App. 3d 151 (1988) *prob. juris. noted,* 57 U.S.L.W. 3687 (April 17, 1989 (No. 88-1374), is whether the imposition of sales and use taxes on a religious organization violates the free exercise clause of the First Amendment. Both the facts and issues in *Swaggart Ministries* differ significantly from those presented in the instant case. In fact, *Swaggart Ministries* highlights *by contrast,* the question presented herein.

First, in *Swaggart Ministries,* the taxpayer is seeking an exemption from a tax, not challenging the tax per se. Second, the tax at issue in *Swaggart Ministries* is a sales and use tax applied throughout the State of California and levied against virtually all tangible assets purchased or brought into the state. There is no dispute that the tax is broad based, not only facially, but also in its application and effect. The issue of potential censorship or governmental interference due to a lack of the inherent checks and balances on governmental action is simply not present.

Conversely, the Ordinance in the instant case was struck down because it imposed a tax with an impermissibly narrow base, only twelve (12) taxpayers would be affected, and of them, the three

(3) Respondents would shoulder ninety percent (90%) of the burden. As demonstrated above, a tax against a limited number of taxpayers creates a potential for abuse which cannot be tolerated, particularly when applied against First Amendment activities.

Third, the tax imposed by the Ordinance will not, as Petitioner suggests, necessarily fall on consumers as opposed to the organization. Petitioner concedes that Montclair is a relatively small city, and as such, movie goers undoubtedly go outside the city to view movies. If the price of admission to Respondents' movies was increased to absorb the cost of the tax, movie goers would likely go elsewhere. Respondents would be compelled to keep prices competitive with the surrounding market, forcing them to pay the tax themselves.

Finally, the tax on items sold by Swaggart Ministries is content neutral. The items taxed were household items and souvenirs, not religious artifacts. In contrast, the Ordinance taxes the activity of viewing movies directly, not an incidental activity, such as buying popcorn or memorabilia.

Given the substantive factual and legal differences between *Swaggart Ministries* and the case at bar, this Court's notation of probable jurisdiction of the former, provides no basis for the Court to grant *certiorari* in the latter.

II

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari filed in this case should be denied.

Dated: September 22, 1989

Respectfully submitted,

LILLICK & CHARLES

BARRY J. LONDON* **
LESLEY B. HARRIS

Attorneys for Respondents

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* Attorney of Record

** Mr. London has submitted to the Court his application for admission and all supporting documentation.

No. 89-316

In The

Supreme Court of the United States

October Term, 1989

CITY OF MONTCLAIR, a California City,

Petitioner,

v.

UNITED ARTISTS COMMUNICATIONS, INC.; VISTA THEATERS, INC., and GENERAL CINEMA THEATRE CORPORATION OF CALIFORNIA,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

EUGENE DEMCHUK, City Attorney
City of Montclair, and
BURKE, WILLIAMS & SORENSEN,
Special Counsel
J. ROBERT FLANDRICK*
VIRGINIA R. PESOLA
One Wilshire Building, 11th Floor
624 S. Grand Avenue
Los Angeles, California 90017
Telephone: (213) 236-0600

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Petitioner City of Montclair files this Supplemental Brief to call the Court's attention to a new case decided by the Ninth Circuit Court of Appeals, *Acorn Investments, Inc. v. City of Seattle*, No. 88-3657 (9th Cir. Oct. 5, 1989). (App. 1-21.)

Acorn illustrates the confusion that reigns in both the state and federal court systems in this area. Although both cases involve taxation of First Amendment-protected businesses, the state Court of Appeal which decided the pending case used the test in *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) as a basis for invalidating the admissions tax, while the *Acorn* case used the test in *City of Renton v. Playtime Theaters*, 475 U.S. 41 (1986), a zoning case, to invalidate the tax at issue in *Acorn*.

In its Petition for Writ of Certiorari the City argues that, assuming arguendo the *Minneapolis Star* analysis is applicable, the City has met its burden of showing an "overriding governmental interest." If the Ninth Circuit is correct and tax ordinances are subject to the *Renton* "substantial interest" test, the Montclair ordinance certainly is constitutional. Undisputed evidence in the record shows that the City of Montclair imposed the admissions tax to combat the secondary effects of the theaters on the community, that is, to pay the cost of the extraordinary public services required by the businesses taxed due to the large numbers of persons, many of whom are not residents of the City, which patronize these businesses.

EUGENE DEMCHUK, City Attorney
City of Montclair, and
BURKE, WILLIAMS & SORENSEN,
Special Counsel
J. ROBERT FLANDRICK*
VIRGINIA R. PESOLA
One Wilshire Building, 11th Floor
624 S. Grand Avenue
Los Angeles, California 90017
Telephone: (213) 236-0600

Counsel for Petitioner

*Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Acorn Investments, Inc *Plaintiff-Appellant,* v. CITY OF SEATTLE; WALTER TANK; DOUGLAS JEWETT, *Defendants-Appellees.*	No. 88-3657 D.C. No. CV-87-19-R OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
June 5, 1989 – Seattle, Washington

Filed October 5, 1989
Before: Alfred T. Goodwin, Chief Judge,
Eugene A. Wright and William A. Norris, Circuit Judges.

Opinion by Judge Norris:
Concurrence by Judge Wright

COUNSEL

Jack R. Burns, Burns and Hammerly, P.S., Seattle, Washington, for the plaintiff-appellant.

R. James Pidduck, Assistant City Attorney, Seattle, Washington, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

Acorn Investments, Inc. owns and operates panoram machines at four adult entertainment centers in the City of Seattle. When a customer inserts one or more quarters into a panoram, the machine exhibits a video tape or motion picture on a screen for a few minutes.[1] A customer may also view live entertainment through a panoram. Each panoram is located in a booth that gives individual patrons some degree of privacy.

In this action, Acorn attacks as violative of the First Amendment city laws that require panoram businesses to pay various license fees and to disclose the names and addresses of shareholders. The district court awarded the City summary judgment on the shareholder disclosure issue and, after a one day bench trial, ruled in favor of the City on the license fee issue. We reverse on both issues.

I.

THE CITY'S PANORAM LICENSING ORDINANCE

The Seattle ordinance licensing panorams dates back to 1955.[2] As originally enacted, the ordinance required panoram businesses to obtain two separate licenses, a Panoram Location License and a Panoram Operator License was $25 per panoram machine per annum, and the fee for a Panoram Operator License was $300 per annum. In 1961, the City amended the ordinance to require the following three licenses and fees: Panoram Location License – $5 per machine per annum; Panoram

Sub-License – $5 per machine per annum; Panaram Operator License – $500 per annum plus 5% of the total gross income of all machines operated. These three licenses have been required ever since; the current fee schedule is as follows: Panoram Location License – $30 per machine per annum; Panoram Sub-License – $30 per machine per annum; Panoram Operator License – $650 per annum, plus $25 per month per machine. Seattle Municipal Code (SMC) 6.42.03C.[3]

In 1987, the City collected panoram license fees of $86,715 from Acorn and the seven other businesses operating panorams in the City during that year. The cost to the City of administering the panoram licensing program for all panoram establishments in 1987 was approximately $2,040, while the cost of providing police surveillance at panoram establishments was approximately $65,068.

Acorn filed this action in 1987, claiming that the City discriminates against the owners and operators of panoram machines in violation of the First Amendment by taxing and licensing the machines differently from other coin-operated amusements.[4] Acorn based its claim on *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), where the Supreme Court struck down a taxation scheme which treated the press differently from other businesses because the scheme was not necessary "to achieve an overriding governmental interest." *Id.* at 582. As the Court explained, "differential treatment [of the press], unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585.

The City, on the other hand, argued to the district court that *Minneapolis Star* was inapposite because the license fees on panorams are in fact justified by a special characteristic of the panoram booths – their privacy makes them convenient places for criminals to plan or engage in illegal activity such as dealing drugs or fencing stolen property. The City contended that the license fees are used to offset the cost of increased police surveillance required by the privacy and location of the panorams. Specifically, the City pointed to the cost of increased police surveillance and inspection of panoram booths located in a high crime area of downtown Seattle between First, Second, Pike and Pine Streets, known as "the Block". The City did not argue that panoram booths located off "the Block" pose any special law enforcement problems.[5]

In arguing its case, the City relied heavily upon *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), in which the Supreme Court upheld against First Amendment challenge a municipality's attempt to zone adult theatres to keep them away from schools, churches, residences and parks. In *Renton*, the Court was faced with a zoning ordinance which was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theatres on the surrounding community." *Id.* at 47 (emphasis omitted). The Court held that the Renton ordinance was constitutional because Renton had proven that adult theatres generate specific harmful "secondary effects" on neighborhoods, and had selected a reasonable means for preventing these effects. *Id.* at 52.

The district court rejected Acorn's reliance on *Minneapolis Star* and accepted the City's analogy to *Renton*. The court held that the City's panoram licensing scheme, like the zoning provision at issue in *Renton*, was an "attempt[] to control the secondary effects of panorams," and not an attempt "to regulate the content of the videos shown on the machines." Excerpts of Record ("E.R.") at 7. The district court then ruled that the license fee scheme was constitutional because it furthered a substantial government interest and allowed for reasonable alternative avenues of communication – the standard for content-neutral time, place and manner regulations the Supreme Court applied in *Renton*. *See* 475 U.S. at 50.

In applying the *Renton* test, the district court found that panorams on "the Block" generate "adverse effects on the areas in which they operate" because they contribute to "the Block's" crime problem. E.R. at 8. The district court stated that "the Block" is "the City's focal point for prostitution, drug sales, robberies, assaults and other street crime[s]" and while "panorams are not the sole cause of the criminal conduct, they contribute substantially to it." E.R. at 31-34. The district court found that the City had a substantial governmental interest in trying to prevent the secondary effects created by the panorams. Thus, the district court concluded that the City had satisfied the requirement of *Renton* that the ordinance serve a substantial governmental interest. The district court also concluded, without elaboration, that the licensing scheme satisfied the other requirement of *Renton* that the ordinance allow for adequate alternative of communication.

Acorn argues on appeal, as it did below, that the City's licensing ordinance ordinance should be analyzed

not under the *Renton* standard but rather under the *Minneapolis Star* "necessary to achieve an overriding governmental interest" test. Whether the more stringent *Minneapolis Star* standard applies is a question we need not reach, however, because we find persuasive Acorn's alternative argument that the license fee scheme cannot survive scrutiny even under the *Renton* test for content-neutral time, place or manner regulations.

The City maintains that the licensing fees further a substantial governmental interest, because they force panoram businesses to shoulder some of the police costs incurred by the City to combat the criminal activity taking place inside the panoram establishments. Acorn does not dispute the City's contention that requiring panoram businesses to pay for these costs would be a substantial governmental interest if panorams posed a special law enforcement problem. Acorn argues, however, that the City has completely failed to prove that panorams on "the Block" are currently conducive to criminal transactions. Acorn points out that even under the *Renton* analysis, a city must prove the existence of the "secondary effects" it is seeking to prevent. *See Renton*, 475 U.S. at 50-51.

We assume, without deciding, that if panorams fostered criminal activity, the City would have a substantial interest in combatting this secondary effect through a licensing scheme imposed on the panorams. We agree with Acorn, however, that the licensing scheme at issue here does not further any such interest because the City has failed to prove that panorams foster criminal activity on "the Block" or that they serve as the site for more

criminal activity than other business establishments on "the Block."

We recognize that the district court explicitly found that the City's evidence established that the panorams "foster criminal activity," E.R. at 33, and that "the location and physical configuration of panorams distinguish them" from other businesses and pose a "clear potential for criminal use." E.R. at 35. We must uphold these findings unless "clearly erroneous." Fed. R. Civ. P. 52(a). We are bound to them unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). We are left with such a conviction in this case. The record yields no evidence to support the district court's broad finding that panorams foster criminal activity on "the Block". In fact, the City focused its evidence at trial on criminal activity occurring in the panorams, rather than the secondary effects of panorams on crime on "the Block."

As to the district court's finding about the uniqueness of panorams, the evidence shows that, while panorams on "the Block" may have been used for crimes such as prostitution and drug dealing before 1986, the evidence fails to show that they continue to pose a special law enforcement problem. This change in the level of criminal activity taking place inside the panoram booths can be traced to the City's adoption in 1986 of an amendment to the panoram ordinance, regulating for the first the design and construction of the booths.

Prior to the 1986 amendment to the ordinance, the panoram booths were designed to provide maximum privacy to the customer. The booths were large enough to accommodate more than one person, and private enough to conceal any criminal activity engaged in by the people occupying the booth. Because of the configuration of the booth and the locking doors, it was difficult, if not impossible, for anyone outside the booth to monitor what was going on inside. All this changed in 1986 when the City amended the panoram ordinance to regulate the design of the booths themselves. The amended ordinance requires that the curtain or door at the entrance to the booth be cut off two feet from the bottom so that someone in the main aisle connecting the booths can determine the number of persons inside. If the booth contains a chair or any other place to sit, a large window has to be left in the door or curtain providing an unobstructed view of the interior of the booth. The booth must be sufficiently illuminated so that someone outside can determine the number of persons inside and the door to the booth cannot be locked. Finally, a sign must be prominently displayed, inside as well as outside the booth, informing customers that only one person can occupy the booth and that violators will be criminally prosecuted. SMC 6.42.110.

In sum, the panoram booths are now configured in such a fashion that anyone on the outside can determine whether more than one person is using the booth. It comes as no surprise, then, that the booths are much less attractive now than they once were to those who would use them for illegal transactions. Common sense compels this conclusion, as does the testimony of the police officers who were called by the City to testify to the amount

of criminal activity currently taking place inside the panorams.

For example, the first officer who testified for the City, Sergeant Doman, concluded that because the 1986 regulations made the interiors of the booths visible to those outside, "people are not willing to use the booths for [criminal] types of activities." Reporter's Transcript ("R.T.") at 26. Especially telling is the following exchange between the City's counsel and Sergeant Doman:

> Q: [C]urrently, is your unit making any arrests in panoram business?
>
> A: No, we are not.
>
> Q: Is it issuing much in the way of citations?
>
> A: No, we are not.
>
> Q: And is there something you attribute that to?
>
> A: [T]he new ordinance regulating the doors and the viewing ports in the doors.

R.T. at 28.

Sergeant Doman's testimony is fully corroborated by the statements of other officers responsible for panoram inspection. Officer Niemiec stated that "[law] enforcement has lessened because of the door policy, which has changed under the new ordinances." R.T. at 44. Similarly, Officer Wirth noted that the change in the door policy had "been a great help" because it "made the pan room much less attractive to a criminal conducting illegal activity." R.T. at 133. Another officer stated that he could not "recall[] citing anyone inside the panorams for violations" within the last "couple of years," R.T. at 118 (testimony of Officer Ash). Indeed, the district court

acknowledged "the fact that the officers themselves seem to recognize a difference due to the change in ordinance." R.T. at 72.[6] In fact, not a single witness testified that criminal activity in panorams is currently great enough to warrant the costs of heightened police inspection and surveillance. Thus, although the panoram booths might have been conducive to criminal activity prior to 1986 because of the privacy they afforded, the district court's finding that panorams on "the Block" currently foster criminal activity because of their current configuration or location lacks record support.

At oral argument, the City relied on a statement Officer Niemiec made during trial to the effect that criminal activity had increased as more panorams moved onto "the Block". Officer Niemiec testified that it was his observation that "criminal activity seems to gravitate towards where the pan rooms are located, for some reason." R.T. at 54. This testimony by Officer Niemiec cannot carry the day for the City. As we read his testimony, Officer Niemiec did little more than note what appeared to him to be a correlation between criminal activity in a neighborhood and the presence of panorams. The City, however, has never tried to justify the licensing scheme on the grounds that panorams attract criminals to "the Block" and the surrounding neighborhood generally.[7] Rather, the City justified the licensing scheme as necessary to cover law enforcement costs *stemming from crimes being committed on the premises of the panorams themselves.* Nothing in Officer Niemiec's testimony suggests that there is a correlation between criminal activity in the panorams and criminal activity in the surrounding

neighborhood. Thus, Niemiec's testimony provides no support for the district court's finding that panorams foster criminal activity *in the general area.*

We thus conclude that the current panoram license fees violate the First Amendment under the *Renton* standard. The City has not established that the licensing scheme furthers a substantial government interest. Indeed, the governmental interest advanced by the City to justify the licensing fees – requiring panoram operators to pay for the harmful secondary effects of criminals activity in the panoram establishments – is not supported by the City's own evidence at trial.[8] We now turn to Acorn's challenges to the City's shareholder disclosure rule.

II

THE CITY'S SHAREHOLDER DISCLOSURE RULE

The Seattle panoram ordinance authorizes the Director of Licenses to issue administrative rules to carry out and enforce the provisions of the ordinance. SMC 6.02.050. Pursuant to this authority, the Director of Licenses promulgated Rule 6.42.040.1, which requires any corporation applying for a panoram license to provide

> [a] listing of all shareholders(s), including true names and residence addresses, of those shareholders who voted to elect current members of the Board of Directors of the Corporation: *Provided,* if any such Director received the votes of more than 51% of the shares held by shareholders, then those shareholders who voted the largest number of shares in support of the Director shall be disclosed until the total shares so disclosed equals or exceeds 51%.

* * *

> If shares in the Corporations are held by other than individuals, the ownership entities must be disclosed to the level where individual owners are identified.

Id.[9] If a corporate applicant fails to provide this information, the licensing agency may refuse to process the application. However, the rule expressly provides that no applicant will be denied a license because of the identity of any of its shareholders. Rather, "[t]he information will be used solely to identify and notify control persons of their responsibilities under [the licensing ordinance] and *to hold such person legally responsible should any provisions of [the ordinance] be violated.*" *Id.* (emphasis added).

Acorn argued to the district court that forced disclosure of individual shareholders' identities unconstitutionally chills the exercise of their First Amendment rights.[10] The district court summarily rejected this argument, stating that it was "not persuaded . . . that limited shareholder disclosure chills or unreasonably restricts protected speech." E.R. at 13. Moreover, to the extent any speech might be chilled, the court concluded that, "accountability is a sufficiently compelling interest to justify potential burdens on protected expression." *Id.* We must disagree.

The City does not dispute that the firms and live shows exhibit in panorams are forms of expression entitled to the "same degree of protection afforded speech clearly at the core of first amendment values." *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986). As the Supreme Court has recognized, forcing an association engaged in protected expression to disclose the names of its members may have a chilling effect on that expression.

Cf. Talley v. California, 362 U.S. 60, 64 (1960) (requiring handbills to display names of their sponsors restricts freedom to distribute information); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (compelled disclosure of membership lists of political advocacy group likely to have chilling effect on group's activities). This chilling effect exists even when it is not the government's intention to suppress particular expression. *NAACP v. Alabama*, 357 U.S. at 461. For this reason, a compelled content-neutral disclosure rule is unconstitutional unless it furthers a substantial governmental interest. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1975). Further, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* (footnotes and citations omitted). In the instant case, the City of Seattle has failed to identify a substantial governmental interest that is furthered by requiring disclosure of the identity of shareholders of corporations engaged in the panoram business.

The City asserts that requiring corporate applicants for panoram licenses to disclose the names and addresses of their shareholders "is intended to gain accountability, in the least intrusive manner, from the actual owners and those responsible for the control of a panoram business." Appellees' Brief at 26. In support of its claim, the City offers the deposition testimony of the Director of Licensing, describing the problems the City has historically encountered when trying to enforce the panoram ordinance because corporate officers and managers were either not properly listed on the license application or could not be located. With the shareholder disclosure rule, the City argues, it has the ability to go beyond the

officers and directors to "identi[f]y . . . the real 'control persons' or policy makers of panorams." Appellees' Brief at 36.

Because officers and directors, not shareholders, are legally responsible for the management of the corporation's business, we fail to see how the City's interest in accountability is served by notifying shareholders that the doors of the panoram booths be cut off two feet from the bottom or that booths be lighted. These are management, not shareholder, concerns. If panoram booths fail to comply with the ordinance, the City is free to take appropriate enforcement action against the corporation and its officers and directors. The most obvious remedy available to the City is to put the corporation out of the panoram business by revoking its city licenses. In the end, the shareholders will be held accountable in the only way they can be held accountable – through a diminution of the value of their stock. But that will happen automatically whether or not their names are disclosed to the City. In short, there is no logical connection between the City's legitimate interest in compliance with the panoram ordinance and the rule requiring disclosure of the names of shareholders.

In rejecting Acorn's First Amendment challenge to the disclosure rule, the district court sought to distinguish the Seventh Circuit decision in *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), which struck down as unconstitutional a similar shareholder disclosure provision in an adult bookstore licensing ordinance. *Id.* at 1217. *Genusa* cannot be distinguished so easily, however. In that case, the city of Peoria required the officers, directors and

shareholders holding more than ten percent of the corporation's stock to disclose extensive background information. Although the information sought under the provision was of a more personal nature than that sought by Seattle in this case, the Seventh Circuit's analysis did not focus on the nature of the information to be disclosed. Rather, the court questioned whether there was any relevant correlation between the asserted governmental interest in obtaining the information and the information required to be disclosed. The court determined that the disclosure requirement violated the First Amendment because all the information that the city of Peoria needed for the enforcement of its adult bookstore licensing ordinance could be obtained from the corporation itself. Accordingly, the court concluded that there could be "no purpose other than harassment in requiring the individual . . . stockholders to file separate statements or applications." *Id; see also Natco Theatres, Inc. v. Rainer,* 463 F. Supp. 1124, 1132-33 (S.D.N.Y. 1979). *Genusa,* therefore, fully supports our conclusion that a shareholder disclosure statute that potentially chills protected expression cannot stand if the information sought is not reasonably related to the furtherance of a legitimate and substantial governmental interest in regulating the protected activity.

In conclusion, we hold that both the license fee scheme and the shareholder disclosure requirements of the City's panoram ordinance violate the First Amendment. Accordingly, the judgment of the district court is

REVERSED.

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[1] The Seattle ordinance governing panorama refers to them as "peepshows." Seattle Municipal Code (SMC) 6.42.010.

[2] Since 1955 panorams have also been subject to zoning restrictions. Like adult theatres, panorams are prohibited "within three hundred feet of the grounds or building of any public or private elementary and secondary schools." SMC 6.42.120.

[3] The City increased the fees periodically from the 1961 levels. These increases occurred in 1968, 1980, and again in 1987.

[4] It is undisputed that at least some, if not all, of the video tapes and live entertainment viewed in Acorn's panorams are protected by the First Amendment.

[5] Five of the nine licensed panoram locations in the City are on "the Block." Although the record does not indicate precisely how many of the City's individual panoram booths are located on "the Block," the record does show that in 1986, panoram establishments located off "the Block" paid 52.7% of the total panoram license fees collected, and in 1987 these "off Block" panorams accounted for 47.7% of the license fee revenue.

[6] Although some officers believed that there was some suspicious activity taking place on the panoram premises or in the booths, the activity rarely became criminal activity for which citations could be issued or arrests made.

For example, Officer Englin thought that panorams would be conducive to criminal activity "[b]ecause they're off the street and they seem – I don't know the way or the wherefore, I'm guessing because it's [sic] out of sight." R.T. at 93. Yet, since implementation of the 1986 ordinance requiring reconfiguration of the panoram booths, he had not made any arrests for "sexual misconduct inside a panoram location." R.T. at 98. Officer Rodriguez noticed "more known prostitutes that [he] know[s] that are going into the pan rooms," R.T. at 64, and yet, since 1986, he had made only one arrest for prostitution in a panoram booth. R.T. at 62.

In these and other instances, officers expressed unsubstantiated hunches. Such testimony does not satisfy the City's burden of showing that the panorams are conducive to a

heightened level of criminal activity that might justify imposing special license fees on panoram businesses.

[7] Had the City attempted to make this more general "secondary effects on the community" argument, it would have had to explain why it does not impose special taxes or fees on other businesses on "the Block" for their contribution to the criminal activity taking place in the neighborhood. The City's witnesses at trial testified that other business establishments on "the Block," in particular the Marketplace Tavern, were used for criminal transactions and added to the general crime problem in the area. Even under the *Renton* test, a regulatory scheme is unconstitutional if it is too underinclusive. *See Renton*, 475 U.S. at 52.

In spite of the problems with such an argument, and the fact that the City did not raise it, the district court, as we noted earlier, focused on the general impact panorams have on "the Block." For example, the district court identified as a relevant issue for trial "the nature and extent of the secondary effects created by panoram machines *on the areas in which they operate.*" E.R. at 8 (emphasis added). The district court went on to rule that the City "may include as a cost of regulation, police enforcement of the panoram ordinance and other ordinances *within reasonable proximity of panoram establishments.*" *Id.* at 10.

This broader focus of the district court notwithstanding, it remains clear that the City's theory is a more narrow one relating to crime committed *on the premises of panorams*. As the City itself concedes, the evidence at trial was limited to "costs of police enforcement . . . incurred *upon* panoram premises. . . . It did not include . . . any costs of police enforcement incurred off panoram premises." Brief of Appellee at 18.

[8] Moreover, Moreover, even if the City had provided such evidence, it would still have to show, as Judge Wright points out, *see infra* p.___, why its licensing scheme was not overinclusive in that it was directed to all panoram establishments, whether they were located on "the Block" or off "the Block," and the City never contends, and the district court never finds, that panorams located off "the Block" foster criminal activity, either on their own premises or in their surrounding area. *See Renton*, 475 U.S. at 52 (ordinance would need to be

" 'narrowly tailored' to affect only that category of [panorams] shown to produce the unwanted secondary effects").

[9] It is difficult to discern from the language of the rule exactly when shareholder information must be disclosed to the licensing agency.

[10] Acorn also appeals the district court's rejection of its claim that the Director of Licenses exceeded his authority under the ordinance in promulgating the disclosure rule. We agree with the district court that this claim is without merit.

WRIGHT, Circuit Judge, Specially Concurring:

Although the majority and I agree that the panoram licensing ordinance fails to meet the test of *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), I disagree with its conclusion that the district court clearly erred by finding that panorams foster criminal activity. *See FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1304-05 (5th Cir. 1988) (Renton applied to licensing scheme), *cert. granted*, 109 S. Ct. 1309 (1989).

The district court analogized the city's panoram licensing ordinance to the zoning provision in *Renton*, holding that the city was attempting to control the secondary effects of panorams on the areas in which they operated.[1] It found specifically that panorams "foster criminal activity."

The majority acknowledges that it must uphold this finding unless "clearly erroneous" but concludes that:

> The record yields no evidence to support the district court's broad finding that panorams foster criminal activity on "the Block."

If our review was de novo. I might agree with the majority's evaluation of the evidence. But our review is

for clear error, and plenty of evidence supports the district court's finding that panorams foster criminal activity.[2]

However, I would find the ordinance unconstitutional on other grounds. *Renton* instructs us that an acceptable content-neutral time, place and manner regulation must be "designed to serve a substantial government interest and allow[] for reasonable alternative avenues of communication." *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1332 (9th Cir. 1987) (citing *Renton*, 106 S.Ct. at 930). As part of this analysis, we look to see if the ordinance is narrowly tailored, asking if there is "a logical relationship between the evil feared and the method selected to combat it." *Id.* at 1332-33 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1979)).

Here, the city has presented no evidence that panorams off the Block have any harmful secondary effects on the community. It has attempted to control the secondary effects in panoram establishments on *one block* in downtown Seattle, but the ordinance applies to panorams not on this block. These panorams contributed approximately 50% of all revenue raised from the licensing scheme.

The ordinance is unconstitutional because the city has failed to show that it was sufficiently narrowly tailored to affect only that category of panorams shown to produce the unwanted secondary effects. *See Tollis*, 827 F.2d at 1333 (citing *Renton*. 106 S.Ct. at 931).

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[1] The City's evidence established that panoram rooms foster criminal activity. Even if the panorams are not the sole

cause of the criminal conduct, they contribute substantially to it. Combatting this effort, preventing the use of panorams for illegal ends, is by all accounts an important and substantial government interest. Thus, the court finds that the City met its burden of proof on the first issue of fact: panorams create substantial secondary effects which the City has acted to prevent.

Order at pages 4-5.

[2] I disagree also with the majority's characterization of the district court's finding. It did not find that panorams fostered criminal activity "on the Block." It found only that panorams fostered criminal activity.

I understand the district court's finding to be that panorams foster criminal activity at panoram establishments. That finding is consistent with the city's theory that panorams foster criminal activity on the premises. It is also consistent with the evidence presented. The majority acknowledges that the city "focused its evidence at trial on criminal activity occurring in the panorams, rather than the secondary effects of panorams on crime on 'the Block.' "

[3] Sergeant Dorman testified that the new ordinance for booths solved some of the problems at panorams, but that the rooms themselves were still gathering places for many different types of persons, including prostitutes who used them to attempt to solicit business. Altough the sergeant admitted that his unit had not made any prostitution arrests of customers *in* the *booths*, they had arrested persons working in the panoram establishments.

Officer Niemiec had observed acts of prostitution, persons using narcotics, and others doing lewd acts in panoram rooms. He stated that criminal activity seemed to be situated around where the pan rooms were located and that a portion of the criminal activity "on the Block" used the panoram premises. As the majority has noted, he observed also that the criminal activity seemed to gravitate toward where the pan rooms were located.

Officer Rodriguez had seen prostitutes working in the panoram room and had personally made one prostitution and one theft arrest.

When asked about the type of enforcement activity expected in the panoram room, Lieutenant Hunt testified that there was a potential for more criminal activity in the establishments.

Officer Englin had observed narcotics transactions, the transfer of stolen goods, and occasional sexual misconduct in the panoram establishment. He thought they fostered such activity because they were off the street, out of sight, and were open late at night. Although he could not remember any arrests that had been made in the panoram establishments, he had observed what he believed was criminal activity. He spent approximately three quarters of his time in the panorams and only one quarter at other locations.

Officer Ash has also observed narcotics activity in panoram rooms. When asked if his presence as a uniformed police officer had any effect on persons in the panoram establishments, he stated: "I believe our presence acts as a deterrent to any type of crime in panorams or outside on the panoram sidewalks."

Officer Wirth also stated that his presence in the panorams acted as a deterrent.